

Exhibit 10

DOCKET NUMBERS 05-15223 and 05-15347

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FLEMING COMPANIES, INC.,

DEFENDANT, APPELLANT, AND CROSS-APPELLEE,
v.

WAYNE BERRY,

PLAINTIFF, APPELLEE AND CROSS-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

OPENING BRIEF OF APPELLANT FLEMING COMPANIES, INC.

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FCS. The record shows that Berry was completely, objectively *unreasonable* in his steadfast insistence that 17 U.S.C. § 504 was going to result in millions of separate statutory damage awards. The Court considers Berry's nonsensical arguments about the October 29, 1999 proposal⁹² and the alleged \$2 million purchase price for the software.

Berry testified that by dropping off his "shrink wrap license" to employees with no authority to bind Fleming, Fleming was bound by its terms. He even tried to call this an "agreement" which the Court said was misleading. Neither the jury nor the judge bought this agreement. The judge said, "This license was not agreed to by Fleming."⁹³

Equally nonsensical, Berry drafted an invoice charging API \$ 2 million sometime in 1999, but backdated it to November 27, 1995 when he said that he and Borja orally agreed to it.⁹⁴ These two issues alone reveal the objective unreasonableness of Berry's factual and legal arguments.

Compensation And Deterrence. In view of Berry's massive miscalculation of the amount he could recover in this suit, and his ongoing crusade against

⁹² E 021-025 (proposed End User License Agreement, Trial Exhibit 53).

⁹³ E 110- E 114 (Berry's Testimony, February 25, 2003, at 125:13-14; 131:7-9; 136:22-23; 139-140).

⁹⁴ E 001 (Berry's Backdated Invoice to API, Trial Ex. 59); E 109.1-109.5 (Trial Transcript February 25, 2003).